

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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WILLIE ASHBY GRAVES,

Petitioner,

v.

ROBERT LeGRAND, et al.,

Respondents.

Case No. 3:08-cv-00150-MMD-VPC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner. This matter comes before the Court on respondents' second motion to dismiss the petition. (Dkt. no. 24.)

I. PROCEDURAL HISTORY

Petitioner was convicted, pursuant to a jury trial, of sexual assault and false imprisonment. (Exhs. 1 & 13.)¹ Sentencing was held on June 2, 2004. (Exh. 14.) The judgment of conviction was filed that same day, setting forth the sentence of 10 to 25 years in prison on the sexual assault count, with a concurrent 12-month sentence for the false imprisonment count. (Exh. 15.)

Petitioner filed a timely notice of appeal. (Exh. 16.) Appellate counsel filed a fast track statement on July 20, 2004. (Exh. 17.) A fast track response was filed on August 6, 2004. (Exh. 18.) The Nevada Supreme Court affirmed the verdict in a written opinion dated November 4, 2004. (Exh. 19.)

¹The exhibits referenced in this order are found in the Court's record at dkt. nos. 13 & 25.

1 On August 9, 2005, petitioner filed a *pro se* post-conviction petition for writ of
2 habeas corpus in state district court. (Exh. 20.) Counsel was then appointed to
3 represent petitioner, and counsel filed a supplement to the petition on December 9,
4 2005. (Exh. 21.) The State filed a motion to dismiss the petition and the supplement on
5 January 19, 2006. (Exh. 22.) In an order dated February 2, 2007, the state district court
6 dismissed the claims in the *pro per* petition as procedurally barred, but allowed an
7 evidentiary hearing on the supplemental claim. (Exh. 25.) The evidentiary hearing was
8 held and, on April 25, 2007, the state district court denied the supplemental claim. (Exh.
9 26.) Petitioner filed a timely notice of appeal. (Exh. 27.)

10 Petitioner, who was represented by counsel on appeal, filed a fast track
11 statement on July 18, 2007. (Exh. 28.) The State filed a fast track response on August
12 8, 2007. (Exh. 29.) The Nevada Supreme Court issued its order of affirmance on
13 February 7, 2008. (Exh. 30.)

14 On March 25, 2008, petitioner dispatched his federal habeas petition to this
15 Court, pursuant to 28 U.S.C. § 2254. (Dkt. no. 8.) Respondents moved to dismiss the
16 petition as unexhausted. (Dkt. no. 13.) After briefing of the motion, this Court entered an
17 order ruling that Grounds 4, 5, and 6 of the petition were unexhausted. (Dkt. no. 19.) In
18 the order finding Grounds 4, 5, and 6 unexhausted, petitioner was given the option of
19 either: (1) abandoning his unexhausted claims and proceeding with his exhausted
20 claims; (2) dismissing this action without prejudice and returning to state court to
21 exhaust his unexhausted claims; or (3) seeking a stay and abeyance of this action
22 pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), while he returned to state court to
23 exhaust his unexhausted claims. (Dkt. no. 19, at pp. 6-7.) Petitioner chose to move for a
24 stay and abeyance. (Dkt. no. 20.) By order filed August 14, 2009, this Court granted
25 petitioner's motion for a stay and abeyance while he returned to state court to exhaust
26 his unexhausted claims. (Dkt. no. 22.) This Court's order granting the stay and
27 abeyance was specifically "conditioned upon petitioner filing a state post-conviction
28 petition or other appropriate proceeding in state court within forty-five (45) days from the

1 entry of this order and returning to federal court with a motion to reopen [this case]
2 within forty-five (45) days of issuance of the remittitur by the Supreme Court of Nevada
3 at the conclusion of the state court proceedings.” (Dkt. no. 22, at p. 2.)

4 On September 18, 2009, petitioner filed a state petition in compliance with this
5 Court’s order. The state district court denied the petition and petitioner filed his opening
6 appellate brief on April 23, 2012. (Supplemental Exh. 1.) The Nevada Supreme Court
7 denied the appeal by order filed January 16, 2013. (Supplemental Exh. 2.) The Nevada
8 Supreme Court issued its remittitur on February 11, 2013. (Supplemental Exh. 3.)

9 **II. DISCUSSION**

10 Respondents move to dismiss this action because petitioner failed to file a
11 motion to reopen this case within forty-five days of the Nevada Supreme Court’s
12 remittitur, as was directed in the Court’s order granting the stay and abeyance. (Dkt.
13 nos. 22 & 24.) Respondents correctly note that, pursuant to this Court’s order of August
14 14, 2009, petitioner was directed to file a motion to reopen this action within forty-five
15 days following the issuance of the Nevada Supreme Court’s remittitur. The Nevada
16 Supreme Court issued its remittitur on February 11, 2013. (Supplemental Exh. 3.) The
17 time for petitioner to comply with the Court’s order by filing a motion to reopen this
18 action expired on March 29, 2013. Respondents argue that pursuant to Local Rule 4-1
19 of Part IA, this Court has authority to impose “any and all appropriate sanctions on an
20 attorney or party appearing in *pro se* who, without just cause . . . fails to comply with any
21 order of this Court.” Respondents ask the Court to dismiss this action based on
22 petitioner’s failure to comply with the Court’s order by filing a motion to reopen the case
23 or taking other appropriate action.

24 The Court notes that respondents’ present motion to dismiss this action was
25 served on petitioner at his correct address of Lovelock Correctional Center. (Dkt. no. 24,
26 at p. 4.) Additionally, on April 10, 2014, this Court served petitioner with a notice
27 informing him of his right to file a written opposition to the motion to dismiss. (Dkt. no.
28 27.) The notice was served on petitioner at his address of record, Lovelock Correctional

Center. (*Id.*)² Petitioner has failed to file a response to the motion to dismiss. Petitioner has failed to comply with this Court's order directing him to file a motion to reopen this action within forty-five days following the Nevada Supreme Court's issuance of remittitur on February 11, 2013.

District courts have the inherent power to control their dockets and "in the exercise of that power, they may impose sanctions including, where appropriate . . . dismissal of a case." *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an action, with prejudice, based on a party's failure to prosecute an action, failure to obey a court order, or failure to comply with local rules. See, e.g. *Pagtalunan v. Galaza*, 291 P.3d 639, 643 (9th Cir. 2002) (dismissal of habeas corpus petition with prejudice for failure to prosecute action and failure to comply with a court order); *Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring amendment of complaint); *Carey v. King*, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for failure to comply with local rule requiring *pro se* plaintiffs to keep court apprised of address); *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply with court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure to lack of prosecution and failure to comply with local rules).

In determining whether to dismiss an action for lack of prosecution, failure to obey a court order, or failure to comply with local rules, the Court must consider several factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic

²Although the docket reflects that the Court's notice was returned as undeliverable, this is because the Clerk served petitioner with the notice at both Nevada State Prison as well as Lovelock Correctional Center. The notice mailed to Nevada State Prison was returned as undeliverable. The notice mailed to Lovelock Correctional Center was not returned as undeliverable and presumptively was received by petitioner. (See dkt. nos. 27 & 28.)

alternatives. *Pagtalunan*, 291 F.3d at 642; *Thompson*, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423-24; *Malone*, 833 F.2d at 130; *Ferdik*, 963 F.2d at 1260-61; *Ghazali*, 46 F.3d at 53.

The Court finds that the first two factors, the public's interest in expeditiously resolving this litigation and the Court's interest in managing the docket, weigh in favor of dismissal. The third factor, risk of prejudice to respondents, also weighs in favor of dismissal, since a presumption of injury arises from the occurrence of unreasonable delay in filing a pleading ordered by the court or prosecuting an action. *See Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor — public policy favoring disposition of cases on their merits — is greatly outweighed by the factors in favor of dismissal discussed herein. Finally, petitioner's failure to respond to the motion to dismiss, even after the Court's written notice of his right to so respond, leaves the Court with little alternative other than dismissal. Petitioner has failed to obey this Court's prior order by failing to file a motion to reopen the case within forty-five days of the Nevada Supreme Court's February 11, 2013, issuance of remittitur. Petitioner has failed to respond to the pending motion to dismiss or to otherwise prosecute this action. Under such circumstances, there is no lesser alternative than dismissal of this action with prejudice.

III. CERTIFICATE OF APPEALABILITY

District courts are required to rule on the certificate of appealability in the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for certificate of appealability to be filed. Rule 11(a). In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that

1 reasonable jurists would find the district court's assessment of the constitutional claims
2 debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
3 inquiry, the petitioner has the burden of demonstrating that the issues are debatable
4 among jurists of reason; that a court could resolve the issues differently; or that the
5 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,
6 no reasonable jurist would find this Court's dismissal of the petition debatable or wrong.
7 The Court therefore denies petitioner a certificate of appealability.

8 **IV. CONCLUSION**

9 It is therefore ordered that respondents' motion to dismiss (dkt. no. 24) this action
10 is granted.


11 It is further ordered that respondents' motion to substitute Robert LeGrand for
12 and in place of William Donat as the respondent (dkt. no. 29) is granted.

13 It is further ordered that this action is dismissed with prejudice based on
14 petitioner's failure to comply with the Court's order of August 14, 2009, and his failure to
15 prosecute this action.

16 It is further ordered that petitioner is denied a certificate of appealability.

17 It is further ordered that the Clerk of Court shall enter judgment accordingly.

18 DATED THIS 12th day of January 2015.

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22 MIRANDA M. DU
23 UNITED STATES DISTRICT JUDGE
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